

HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HP TUNERS, LLC, a Nevada limited liability company,)	CASE NO. 3:17-cv-05760-BHS
)	
Plaintiff,)	PLAINTIFF’S REPLY MEMORANDUM
)	OF LAW IN FURTHER SUPPORT OF
vs.)	MOTION FOR SANCTIONS
)	
KEVIN SYKES-BONNETT and SYKED ECU TUNING INCORPORATED, a Washington corporation, and JOHN MARTINSON,)	<u>NOTING DATE: DECEMBER 7, 2018</u>
)	
)	<u>ORAL ARGUMENT REQUESTED</u>
)	
Defendants.)	

Plaintiff HP Tuners, LLC (“HP Tuners” or “Plaintiff”) hereby submit this Reply to Defendants’ Opposition to Plaintiff’s Motion for Sanctions (the “Opposition”) (Dkt. 135).

INTRODUCTION AND STATEMENT OF FACTS

Contrary to Defendants Kevin Sykes-Bonnett, John Martinson, and Syked ECU Tuning, Inc.’s (“Defendants”) unfounded assertions, the only attempt to mislead the Court was made by Defendants and their counsel. In filing their frivolous Emergency Motion for Temporary Restraining Order (the “TRO Motion”) (Dkt. 69), Defendants’ goal was to misdirect and divert the Court’s focus and attention from Defendants’ egregious misconduct as detailed in Plaintiff’s

1 Renewed Emergency Motion for Temporary Restraining Order (Dkt. 62). Here, Plaintiff's
 2 Motion for Sanctions (Dkt. 124) sets forth a straightforward narrative, fully supported by the
 3 record, demonstrating that Defendants, along with their counsel, deliberately misled this Court
 4 with respect to material facts in this matter. Defendants and their counsel stand in violation of
 5 Fed. R. Civ. P. Rule 11 and should be subject to sanctions pursuant to Rule 11, 28 U.S.C. § 1927,
 6 and this Court's inherent authority.

7
 8 As set forth in Plaintiff's Motion for Sanctions, on August 21, 2018, Defendants' TRO
 9 Motion was premised upon the false allegation that design schematics and files for the Syked
 10 Eliminator Cable constituted Defendants' "trade secret" information. In fact, as Defendants were
 11 aware at the time they filed the TRO Motion, the information Defendants sought to protect was
 12 neither confidential nor proprietary to Defendants, and Defendants did not, and do not, own any
 13 intellectual property rights associated with the Syked Eliminator Cable.

14 Specifically, in the TRO Motion and defense counsel's declaration in support,
 15 Defendants claimed that HP Tuners obtained "at least two hardware design documents depicting
 16 *highly confidential schematics and layouts for Syked Tuning's newest hardware cable product.*"¹
 17 Dkt. 69, p. 3; see also Dkt. 71, ¶3. The Declaration of Mr. Whitaker expressly stated:

18 Attached as Exhibit 1 is a true and correct copy of a document that was
 19 produced to Syked Tuning by HP Tuners. The document is a highly
 20 confidential hardware schematic detailing parts of Syked Tunings [sic]
 21

22
 23 ¹ In their Opposition, Defendants are seemingly taking the position that they never
 24 contended that the Syked Eliminator Cable and the associated schematics and files were
 25 confidential and proprietary property and information of Defendants. However, Defendants
 certainly never represented in connection with the briefs or at hearing that Defendants did not
 own the intellectual property rights associated with the Syked Eliminator Cable and its
 corresponding schematics and files, and that Mr. Cannata, in fact, did.

hardware cable product. In the lower right corner, the document is labeled
Confidential and Syked Tuning.

(Dkt. 71, at ¶ 3).

Additionally, during the hearing before this Court, which occurred on August 29, 2018 (the “TRO Hearing”), counsel for Defendants, John Whitaker, repeatedly misrepresented that the Syked Eliminator Cable and its related schematics were trade secrets of Defendants. See Hearing Tr., 36:22-25 (“I think we have set out – it’s cut and dried, a pretty obvious case, this is trade secrets, identified as such, that were acquired”), 37:25-38:1 (“There is a lot of stuff in there that is clearly confidential”), 41: 19-21 (“[T]here is a – it should be apparent that there is some concern about confidential information getting leaked out.”). Yet, Defendants astounding allege in their Opposition that they never claimed the information was confidential to them. As such, Defendants are merely adding to the misstatements and mischaracterization of facts that has characterized their behavior throughout this litigation.

Defendants’ response wholly ignores and fails to address the primary issue raised by Plaintiff’s Motion for Sanctions – the representations made by Defendants in connection with the TRO motion that Plaintiff was allegedly in possession of confidential and proprietary information of the Defendants relating to the Syked Eliminator Cable are patently false and without merit. For these reasons, Plaintiff’s Motion for Sanctions should be granted.

ARGUMENT

I. Plaintiff has Satisfied Rule 11’s Safe Harbor Provision.

Under Rule 11’s Safe Harbor Provision:

“[A motion for sanctions] must be served under Rule 5, but it must not be
filed or be presented to the if the challenged paper, claim, defense, contention, or

1 denial is withdrawn or appropriately corrected within 21 days after service or
2 within another time the court sets. If warranted, the court may award to the
3 prevailing party the reasonable expenses, including attorney's fees, incurred for
4 the motion. Fed. R. Civ. P. 11(c)(2).

5 Plaintiff has fully complied with Rule 11 and its requirements. On October 26, 2018,
6 Plaintiff issued a letter to Defendants enclosing the Plaintiff's Motion for Sanctions and
7 demanding that Defendants correct their misrepresentations to the Court. Defendants did not
8 respond within 21 days. Thereafter, on November 20, 2018 (more than 21 days later), Plaintiff
9 filed this Motion for Sanctions pursuant to F.R.C.P 11. Accordingly, Plaintiff was within its
10 rights to file the instant motion for sanctions with the Court, and it has fully complied with the
11 safe harbor provision set forth therein.

12
13 Defendants' contention that they may not be held accountable for their misstatements
14 because the Court had already ruled on Defendants' TRO Motion is nonsensical and defies the
15 purpose of Rule 11, which is to deter frivolous litigation. *See Cooter & Gell v. Hartmarx Corp.*
16 *et al.*, 496 U.S. 384, 393. It cannot be the rule of law that parties are free to misrepresent facts
17 and mislead courts in connection with a motion, thereby causing another party to incur the
18 burden of fees and costs in responding to the frivolous motion, and not be subject to sanctions
19 merely because the court denied the underlying motion. This is a preposterous position for
20 defendants to take, and constitutes an intentional effort to deflect, misdirect, and avoid this
21 Court's focus on Plaintiff's valid Motion. Indeed, the Ninth Circuit has awarded sanctions in
22 response to a motion filed subsequent to the court's determination of the underlying sanction.
23 *See Holgate v. Baldwin*, 425 F. 3d 671 (9th Cir. 2005) (upholding the grant of a motion for
24 sanctions filed over two (2) months subsequent to the court's dismissal of the underlying claim).
25

1 Defendants' reliance on *Islamic Shura Council of S. Cal. v. FBI*, 757 F. 3d 870 (9th Cir.
2 2014) is inapposite. *Shura Council* is completely distinguishable from the instant circumstances.
3 There, plaintiffs alleged that the Federal Bureau of Investigation and the Department of Justice
4 misled the Court by declaring that they had produced all responsive documents in response to a
5 FOIA request from plaintiffs, but later admitted that they had withheld some responsive
6 documents in the interest of national security. 278 F.R.D. 538, 540-541 (C.D. Ca. 2011). The
7 court ultimately determined that the responsive documents that had been withheld were, in fact,
8 properly withheld from plaintiffs based upon national security concerns. *Id.* Thus, although
9 defendants had arguably provided misleading statements to the court, the plaintiffs were not
10 actually damaged by the misinformation.
11

12 Here, in contrast, Defendants' conduct relates to affirmative misrepresentations made to
13 the Court, not mere failure to comply with FOIA procedure. Defendants also proactively filed a
14 TRO Motion with the Court, premised upon the false contention that Defendants had a
15 proprietary and confidentiality interest in the Syked Eliminator Cable and its corresponding
16 schematics and files. Plaintiff was thereby forced to incur significant, unnecessary costs in
17 connection with its opposition to Defendants' Motion.
18

19 Further, Plaintiff did not have any opportunity to discover that Defendants had misled
20 Plaintiff and the Court prior to the Court's issuance of its decision, precisely due to Defendants
21 dishonesty and obfuscation. Rather, Plaintiff first became aware of the fact that Defendants did
22 not have any proprietary or confidentiality interest in the Syked Eliminator Cable and its
23 schematics until Plaintiff took the deposition of the Kevin Sykes-Bonnett on Sept. 25, 2018, after
24 the Court had made its ruling on Defendants' TRO Motion, and after Plaintiff had unnecessarily
25 incurred substantial costs in opposing the motion. Defendants should not get a pass on making

1 intentionally false and misleading statements to the Court merely because Plaintiff was unable to
2 determine the untruthful nature of those claims until after the Court's ruling. Such a
3 determination would reward dishonesty and deceit, creating an absurd precedent that allows a
4 party to mislead the Court with impunity if they are unsuccessful in the underlying motion in
5 which the misstatements were made.

6 **II. Defendants' TRO Motion was Limited to the Syked Eliminator Cable and**
7 **Related Files**

8 Defendants disingenuously argue that the scope of their TRO Motion extended beyond
9 the schematics, documents and files related to the Syked Eliminator Cable in support of their
10 baseless arguments that Plaintiff is in some way misleading the Court and that Defendants' TRO
11 Motion is somehow valid despite its deceptive foundation. As a cursory review of Defendants'
12 TRO Motion demonstrates this argument is simply untrue. The TRO Motion did not identify any
13 confidential information, other than the schematics, documents and files related to the Syked
14 Eliminator Cable, over which it sought protection. Likewise, during the August 29, 2018 hearing
15 on the TRO Motion, Whitaker made specific statements in Court exclusively pertaining to
16 Plaintiff's possession of the documents relating to the Syked Eliminator Cable, and nothing else.
17

18 Furthermore, Plaintiff has been completely forthcoming and transparent with regard to
19 the documents and communications with the anonymous informant, and Plaintiff provided
20 Defendants with all documents, communications and files it obtained from its anonymous
21 informant. And Plaintiff has repeatedly represented to Defendants, as well as on the record, that
22 Plaintiff produced to Defendants all the documents it received from the anonymous informant.
23 In connection with Plaintiff's Renewed Emergency Motion for Temporary Restraining Order and
24 Preliminary Injunction and Consolidated Memorandum in Support, Plaintiff specifically noted
25

1 that Plaintiff provided all communications with the informant, as well as all documents provided
 2 by the informant, to Defendants via discovery. Dkt. 62, f.n.1. Plaintiff also reiterated this fact
 3 before the Court during the August 29, 2018 hearing. See Hearing Tr. 39: 14-16 (“We have
 4 produced everything we have with this anonymous informant.”)

5 Defendants’ assertion that they do not know or have access the full scope of documents
 6 and information Plaintiff obtained from the anonymous informant is therefore belied by the
 7 record and constitutes nothing more than a feeble attempt to justify their entirely improper and
 8 unethical filing of the TRO Motion and ongoing arguments in support thereof.
 9

10 **III. Sanctions are Appropriate under 28 U.S.C. § 1927 and the Court’s Inherent Power**

11 Finally, as set forth in greater detail in Plaintiff’s Motion for Sanctions, this Court has the
 12 authority to impose sanctions outside the scope of Rule 11 in order to deter conduct that, like the
 13 conduct of defendants and opposing counsel in the instant matter, undermines the integrity of the
 14 court and judicial system. In particular, the court may award sanctions under 28 U.S.C. § 1927,
 15 which is aimed at penalizing conduct that unreasonably and vexatiously multiplies the
 16 proceedings; and under the court’s inherent power.” *Lozano v. Yee Cabrera*, 678 Fed. Appx.
 17 511, 513 (9th Cir. 2017), citing *Fink v. Gomez*, 239 F.3d 989, 991 (9th Cir. 2001). Additionally,
 18 in *Link v. Wabash R. Co.*, 370 U.S. 626, 632 (1962), “the U.S. Supreme Court recognized the
 19 ‘well-acknowledged’ inherent power of a court to levy sanctions in response to abusive litigation
 20 practices.” *Roadway Express v. Piper*, 447 U.S. 752, 765 (1980).
 21

22 Here, sanctions against defense counsel are entirely justified under 28 U.S.C. § 1927 and
 23 this Court’s inherent powers. Defendants and defense counsel acted in bad faith in bringing the
 24 TRO Motion, which was premised upon the false notion that Plaintiff was in possession of
 25

1 Defendants' confidential information relating to the Syked Eliminator Cable. Defendants' later
2 deposition testimony uncontrovertibly revealed that not only was the information at issue not
3 confidential to Defendants, it was not confidential to anyone. Any confidentiality associated
4 with the Syked Eliminator Cable and its schematics and related files that may have existed was
5 waived when Ken provided that information to Defendants without any corresponding
6 confidentiality or privacy agreement.

7
8 In fact, at deposition, John Martinson testified that he was not aware of any
9 confidentiality restrictions associated with the Syked Eliminator Cable. At deposition, Mr.
10 Martinson testified as follows:

11 Q: The diagrams or schematics and layouts and Gerber files associated with the Syked
12 Eliminator Cable is not confidential information of Syked, is it?

13 A: Sorry, I blanked. Can you please repeat the question.

14 (Question on Page 84, Lines 17-19 read by the reporter.)

15 A: I don't believe so.

16 It's not -- the hard -- the cable design is not owned by Syked ECU Tuning, correct?

17 A: Correct.

18 Q: So you would agree with me that -- well, strike that. Syked ECU Tuning does not
19 have any agreement with Ken to maintain any confidentiality of Ken's diagrams and layouts or
20 schematics of his Syked Eliminator Cable; is that right?

21 A: I don't know.

22 Q: Well, you said earlier there was no agreement between Ken and Syked EDU Tuning
23 relating to the Syked Eliminator Cable; is that right?

24 A: I don't recall. Yeah.

1 Q: You're not aware of one?

2 A: I don't recall.

3 Martinson Tr. 84:17-85:18

4 Consequently, Defendants did not know of or recall any restrictions or confidentiality
5 obligations associated with the schematics and files relating to the Syked Eliminator Cable.
6 Therefore, Defendants' claims of confidentiality are overstated and any confidentiality which
7 may have existed over the information has been waived by virtue of the dissemination of those
8 documents to Defendants without restrictions on use or confidentiality in the first instance.
9

10 Furthermore, contrary to Defendants' claims, no finding of bad faith is required for
11 sanctions under § 1927. In *Fink v. Gomez*, the Ninth Circuit held that recklessness alone
12 "suffices for sanctions under § 1927, but bad faith is required for sanctions under the court's
13 inherent power." 239 F. 3d at 993. Thus, even if defense counsel contends that it did not act in
14 bad faith in asserting a confidentiality interest over information which was not confidential to
15 anyone, defense counsel was completely reckless in not making a reasonable inquiry to verify its
16 motion. Indeed, as set forth above, Plaintiff was able to easily determine the lack of veracity of
17 the information by merely posing the question to Defendants at deposition. Accordingly,
18 Defendants and defense counsel are also subject to sanction under the Court's inherent authority
19 and under 28 U.S.C. § 1927 and must be held accountable for their deceitful actions which have
20 prejudiced Plaintiff and undermined the integrity of this Court.
21

22 **CONCLUSION**

23 In consideration of the foregoing, this Court should GRANT Plaintiff's Motion for
24 Sanctions.
25

1 Dated: December 7, 2018

Respectfully submitted,

2 s/ Stephen G. Leatham

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2018, I caused the foregoing to be electronically filed with the Clerk of Court using the **CM/ECF system** which will electronically send Notice to all Counsel of Record.

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